

Competition and Control in International Adjudication

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DRAFT

This paper takes issue with the standard view among international law and international relations scholars that States have sufficient and effective tools to constrain international courts. Like international organizations generally, international courts have minds and interests of their own. As a result, they can be tempted to expand their powers beyond those provided for in their mandates or by informal expectations. At the same time, international courts are protected from external control because of the principle of judicial independence and because of structural constraints on international lawmaking and institutional reform. This combination of weak external control and imperfect self-control provides international courts with opportunities to exceed their mandates. It also makes States more likely not to consent ex ante to the jurisdiction of international courts, to withdraw from the jurisdiction of courts to which jurisdiction they had previously consented, and to disobey judicial decisions. In other words, weak judicial control mechanisms create weak dispute resolution mechanisms. This is not optimal, as the international system needs more not less opportunities for peaceful dispute settlement. In order to strengthen international courts, we need to think anew about how best to maintain control over them. The answer, though, is not, as some would have it, to decrease judicial independence by increasing State control. Instead, this paper argues that increasing competition among international courts will more effectively constrain international judicial power and, consequently, increase the likelihood that States will recognize and accede to international judicial authority. Competition among courts will also lead to better decisions. Therefore, in contrast to the received wisdom that international courts should be more respectful and deferential to each other, this paper claims that such “system-protective” doctrines are counterproductive. Instead of striving for uniformity, we should accept and develop a system of competitive adjudication in international law.

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Different and more or less conflicting systems of law, different and more or less competing systems of jurisdiction, in one and the same region, are compatible with a high state of civilization, with a strong government, and with an administration of justice well enough liked and sufficiently understood by those who are concerned.

S.F.C. Milsom¹

I. INTRODUCTION

States are increasingly delegating or transferring powers to international organizations,² and international organizations are increasingly pushing the limits of the powers conferred upon them. This expansion of powers embraces all areas of international authority – particularly lawmaking and adjudication.³ Recognizing that international organizations have gained this greater role, scholars have begun to think more deeply about the legitimacy, accountability, and good governance of international organizations,⁴ and, as current discussions about the expansion of the Security Council demonstrate,

¹ S.F.C. Milsom, *Introduction* to 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* at xciv (2d ed. reissued, 1968) (1898).

² See generally DAN SAROOSHI, *INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS* (2005). On the constitutionality in the United States of delegations to international organizations, see Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 *STAN. L. REV.* 1557 (2003); Thomas M. Franck, *Can the United States Delegate Aspects of Sovereignty to International Regimes?*, in *DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY I* (Thomas M. Franck ed., 2000); David M. Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 *STAN. L. REV.* 1697 (2003); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 *MINN. L. REV.* 71 (2000); and Edward T. Swaine, *The Constitutionality of International Delegations*, 104 *COLUM. L. REV.* 1492 (2004).

³ See generally JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005).

⁴ See, e.g., Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 *AM. J. INT'L L.* 596 (1999); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 *AM. J. INT'L L.* 510 (2003); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE L.J.* 1490 (2006); Thomas M. Franck, *Legitimacy in the International System*, 82 *AM. J. INT'L L.* 705 (1988); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *AM. POL. SCI. REV.* 29 (2005); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 *INT'L ORG.* 379 (1999); Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15 (2005); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents, and Legitimacy*, 17 *NW. J. INT'L L. & BUS.* 681 (1996-1997).

States (as well as non-State entities, such as the European Union⁵ and nongovernmental organizations), knowing what's at stake, have become more forthright in seeking a seat at the table.⁶

As the powers of international organizations have expanded, the need to maintain control of international organizations has also grown. "Control" means checks on the powers of the organization that ensure that the organization acts within its assigned mandate.⁷ Controls, such as the checks and balances of the U.S. Constitution, are necessary in any system of limited powers. Without them, restrictions, as they appear in an organization's charter, are liable to disappear, and the organization is likely to take actions either in violation of its allocated authority (the claims of *ultra vires* and *excès de pouvoir*)⁸ or for a purpose for which that authority was not granted (the claim of *détournement de pouvoir*).⁹ Depending on their content, such actions could jeopardize the legitimacy of the organization and, conceivably, its very existence. Controls, therefore, are crucial to the successful operation of an international organization; they have greater importance the greater the power given to the organization. This is true whether the international organization (or one of its components) exercises political, legislative, administrative, or judicial functions.

But control is not everything. International organizations need a certain degree of independence in order to accomplish their tasks, and, indeed, that is assumed by the States that create them.¹⁰ Independence – in the forms of autonomy and neutrality – can "enhanc[e] the efficiency and legitimacy of collective and individual actions."¹¹ The assumption of independence is particularly true for international

⁵ On the EU and EC's attempts to become more active in international fora – and, occasionally, to supplant the roles of its member states – see, for example, Duncan B. Hollis, *Why State Consent Still Matters: Non-State Actors, Treaties and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 155-61 (2005).

⁶ Cf. John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 512, 604 (2000) ("[T]here is a sad dilemma at the heart of all constitutions: the more wealth a regime creates, the greater the incentives for interest groups to distort the system to their advantage."); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2411 (1991) (noting how "the closure of Exit leads to demands for enhanced Voice").

⁷ See W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 1 (1992).

⁸ See *id.* at 6.

⁹ See generally J.E.S. Fawcett, *Détournement de Pouvoir by International Organizations*, 33 BRIT. Y.B. INT'L L. 311 (1957).

¹⁰ See Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RES. 3, 16-23 (1998).

¹¹ *Id.*; see also Yoram Z. Hafetz & Alexander Thompson, *The Independence of International Organizations: Concept and Application*, 50 J. CONFLICT RES. 253, 256 (2006).

courts, which, like their domestic counterparts, require independence as a prerequisite of their legitimacy and the successful fulfillment of their responsibilities.¹²

A tension between independence and control is inherent in all forms of international delegation, but no more so than with delegation to international courts.¹³ Courts are accorded independence on the condition that there are sufficient effective controls in place, and controls are tailored so as not to impede too greatly on judicial independence. In some highly developed domestic legal systems, such as in the United States,¹⁴ the controls are so finely tuned and trusted that courts are allowed powers, in some instances, to negate the acts of other governmental entities (judicial review of legislative and administrative acts) or to develop the law on their own (common-law-making).¹⁵ In less developed systems, such as international law, courts do not have such expansive authorities,¹⁶ but their impact is no less great and their role is no less important.

International law scholars have argued recently that we need not worry about the potential excesses of international courts – and particularly international judicial lawmaking – because existing controls effectively keep courts in check.¹⁷ Described variously as

¹² See generally Theodor Meron, *Judicial Independence and Impartiality in International Criminal Courts*, 99 AM. J. INT'L L. 359 (2005); see also Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271 (2003); Edward Gordon, et al., *The Independence and Impartiality of International Judges*, 83 AM. SOC'Y INT'L L. PROC. 508 (1989); Symposium, *Independence and Accountability of the International Judge*, 2 LAW & PRAC. INT'L CTS. & TRIBUNALS 3 (2003).

¹³ Cf. Jonas Tallberg, *Delegation to Supranational Institutions: Why, How, and with What Consequences?*, 25 W. EUR. POL. 23, 28 (2002) (“What truly makes delegation a dilemma is the fact that its very rationale may prevent government principals from establishing effective control mechanisms.”).

¹⁴ See, e.g., Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1251-53 (1984) (describing the external and internal constraints on the U.S. Supreme Court); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 679 (1993) (concluding that U.S. “[j]udges are constrained by the political system that surrounds them”).

¹⁵ Of course, the exercise of such authorities by courts in even the most developed legal systems is controversial in particular cases and is rejected by some categorically.

¹⁶ See Joel P. Trachtman, *The Domain of WTO Resolution*, 40 HARV. INT'L L.J. 333, 347 (1999).

¹⁷ See, e.g., Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1 (2006); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 3 (2005); Laurence R. Helfer, *Why States Create International Tribunals: A Theory of Constrained Independence*, in INTERNATIONAL CONFLICT RESOLUTION 253 (Stefan Voigt, Max Albert, & Dieter Schmidtchen eds., 2006); Laurence R.

“bounded discretion”¹⁸ or “constrained independence,”¹⁹ these scholars assert that international courts operate in a “strategic space” in which “the political constraint is operating effectively.”²⁰ Consequently, to the extent any judicial lawmaking or innovation has occurred, it has been tacitly approved of by the relevant States, which therefore removes any questions about its legitimacy.²¹

This paper takes issue with the assumption that controls on international courts are sufficient and effective. To the contrary, existing controls over international courts are, in practice, relatively weak. Because of structural constraints on international lawmaking and the intricacies of international politics and diplomacy, States generally lack the ability to correct interpretive errors made by courts,²² and because of the principle of judicial independence, States are unable to direct judges to decide cases in certain ways or otherwise control the substance of judicial decisions. Judges, for their part, have their own interests and are tempted and encouraged to depart from their limited roles in order to expand their own and their courts’ authorities.²³ Internal controls are, thus, relatively weak as well. This is not to say, certainly, that existing controls don’t sometimes work or that judges seldom rule in accordance with law. Simply, controls are not as effective as they are purported to be.

Because States have no obligation to consent to the jurisdiction of international courts, the weaknesses of judicial controls means that States are more likely to avoid courts, abandon them, or disregard their decisions, potentially condemning courts to irrelevance. And, indeed, except in limited contexts, that is often what we see. In order to preserve and strengthen international courts, we need to think anew about how best to maintain control over them.

Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 901, 942-54 (2005); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 249 (2004); cf. William J. Davey, *Has the WTO Dispute Resolution Settlement System Exceeded Its Authority: Consideration of Deference Shown to Member Government Decisions and Its Use of Issue-Avoidance Techniques*, 4 J. INT’L ECON. L. 79 (2001).

¹⁸ Ginsburg, *supra* note 17.

¹⁹ Helfer, *supra* note 17; Helfer & Slaughter, *supra* note 17.

²⁰ Steinberg, *supra* note 17, at 249.

²¹ See Danner, *supra* note 17.

²² Accord Karen J. Alter, *Delegation to International Courts and the Limits of Recontracting Power*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 312 (Darren G. Hawkins, et al. eds., 2006).

²³ Accord Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT’L L. 377, 450 (2006).

The answer is not, as some have suggested, for States to exert greater direct control over international judges.²⁴ As others have pointed out, international courts with independent judges serve useful purposes for States by, among other things, “enhanc[ing] the credibility of international commitments,”²⁵ thereby ensuring the relevant “[legal] regime’s perceived legitimacy and continued operation.”²⁶ Consequently, more State control over judges would be counterproductive. The greater the direct control over judges by States the lesser the utility of those judges and their courts to States.

Instead, this paper argues that increasing competition among international courts has and will continue to more effectively constrain international judicial power and, as a result, increase the likelihood that States will recognize and accede to international judicial authority. Competition among courts will also lead to better decisions over the long-term. Though some have acknowledged in passing the possible benefits of competition among courts,²⁷ no one has provided a comprehensive argument in its favor, linked competition with control, or offered a defense against competition’s critics who claim, as Gilbert Guillaume, former judge and president of the International Court of Justice, recently did, that “The law of the market . . . cannot be the law of justice.”²⁸

²⁴ See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 7 (2005).

²⁵ Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professor Posner and Yoo*, 93 CAL. L. REV. 899, 904 (2005); see also *id.* at 931-36.

²⁶ Robert C. Hockett, *The Limits of Their World*, 90 MINN. L. REV. 1720, 1768 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

²⁷ See Ian Brownlie, *The Peaceful Settlement of International Disputes*, 7 PACE INT’L L. REV. 257, 276 (1995); Thomas Buergethal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, 22 ARB. INT’L 495, 497 (2006); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 354, 361 (1998).

²⁸ Gilbert Guillaume, *Advantages and Risks of Proliferation: A Blueprint for Action*, 2 J. INT’L CRIM. JUST. 300, 301 (2004); see also *The Proliferation of International Judicial Bodes: The Outlook for the International Legal Order*. Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations (Oct. 27, 2000), available at http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_SixthCommittee_20001027.htm; YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 127 (2003); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT’L & COMP. L.Q. 848, 862 (1995) (“New courts or tribunals should be created only when necessary. Moreover, one may wonder whether a mechanism could not be devised to avoid divergences of case law.”)

Part II explains why effective controls are necessary for international adjudication. Part III argues that States, with minor exceptions, currently do not have effective mechanisms to control international courts once those courts have been established. Part IV looks at internal control mechanisms and asks whether judges can effectively control their own interests in expanding the powers of their courts. Part V contends that the international legal system, as it is presently constituted, is well-suited to competitive adjudication, that such competition can provide an effective judicial control mechanism, and that, on balance, this and other characteristics of competition enhance international dispute resolution. To this end, the paper concludes with an argument against “system-protective” judicial devices such as inter-court deference, and in favor of the establishment of “competition-friendly” procedures.

II. CONSENT AND CONTROL

International adjudication is a consent-based system. States are under no obligation to consent to the jurisdiction of an international court, and even when they do, they reflect the limits of their consent in the terms of the court’s mandate or (if permitted) in the terms of their accession to it.²⁹ Such limits can stipulate the court’s subject matter jurisdiction³⁰ and any other preconditions on its exercise. The mandates may also limit the court’s procedures, what law the court may apply, and what remedies it may impose.³¹

Like all organizations with limited mandates, restrictions on international courts would be meaningless without effective control mechanisms. Controls are common in all successful national constitutional systems. The system of checks and balances in the U.S. Constitution is the most obvious example. Controls can be in the original document laying out the institution’s mandate or evolve over time. They can take on a variety of forms. They can be exercised by coequal structures – for example, separate branches of government – or hierarchically – such as, by a higher court over a lower court. They can be formal or informal. They can be internal or external. Internal controls are those exercised by the institution itself. They are, in other words, methods of self-control. External controls, by contrast, are those effected by outside bodies.

²⁹ This discussion is based in part on REISMAN, *supra* note 7, at 1-3; and W. Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 RECUEIL DES COURS 9, 28-37 (1996).

³⁰ See, e.g., Statute of the International Court of Justice, art. 36; Rome Statute of the International Criminal Court, art. 1.

³¹ See, e.g., Statute of the International Court of Justice, art. 38.

Not all control systems are created equal though. Some are more effective than others, and some are more desirable than others. Internal controls are more efficient because they eliminate or reduce the costs of correction by external agents, but most legal systems, including international law, contain a complicated and intertwined combination of internal and external controls in order to reduce the risk of control failure and to ensure optimal control effect.

However constructed, controls provide States the comfort they seek at the moment of consent that an international court will not venture beyond its assigned mandate, and controls continue to provide States the security they require to maintain their consent throughout a court's existence. The work controls do, in other words, is not only objective – that is, actually establishing limits to judicial action. It is, and perhaps more importantly, subjective – the creation of the perception that courts are acting in accordance with their mandates. It is that perception that allows a risk-averse State to do what it need not do – consent to a court's jurisdiction. And it is the failure to create such an impression (or, alternatively, the undermining of an existing positive impression) that weakens consent.

Simply stated, without control there would be no consent, and without consent there would be no adjudication. Thus, when controls are removed (or perceived to be removed), consent is likely to go as well. And when controls are weakened, so too is consent. Effective controls are, therefore, necessary for the existence and success of international dispute resolution. It is important, then, to understand whether there are sufficient and effective controls on international courts, and, if not, how they can be improved.

III. CAN INTERNATIONAL COURTS BE CONTROLLED BY STATES?

On the surface there are a multitude of ways for States to control international courts. States elect a court's judges; they set the court's budget and appropriate funds; they specify the terms of the court's jurisdiction and write the laws that the court applies in particular cases; and, if all else fails, they can withdraw from a court's jurisdiction. The standard view is that these multiple mechanisms of controlling international courts are effective and sufficient.³²

But controlling an international court is not as easy as it looks, for two reasons. First, State control of international courts is limited because courts (and their judges), as an essential component of their

³² See, e.g., Ginsburg, *supra* note 17; Helfer & Slaughter, *supra* note 17.

existence, are provided judicial independence and because the tools for the control of courts are cumbersome and not easily employed. External controls and their limitations – judicial independence and structural constraints inherent to the international system – are the subjects of this Part. Second, State control is limited because international courts, particularly their judges, are not simple puppets – courts and judges have interests and authorities of their own, interests that occasionally differ from those of the States that established them. This second set of reasons, which pertain to judicial self-control, is the subject of Part IV.

A. *External Controls on International Courts*

External controls on international courts are many and various, encompassing actions both *ex ante* and *ex post*.³³ They come in five categories: (1) control over the court's mandate; (2) control over the rules the court applies; (3) control over the court's staffing; (4) control over the court's budget; and (5) control over a court's ability to make and apply its decisions.

1. *Mandate Control*

States control a court's mandate, the basic document that establishes the court and sets the terms of the court's jurisdiction and operation. Mandate control operates both *ex ante* and *ex post*. States, for instance, can limit a court's jurisdiction *ex ante*, and if they find that the original jurisdictional grant is flawed, they have the ability to revise the court's mandate *ex post*.³⁴ The Security Council, for instance, has amended the ICTY and ICTR statutes a number of times in order to enhance efficiency of the courts by increasing the number of judges available to hear cases and by adding an additional prosecutor.³⁵ The Council has also set out "completion strategies" for the two ad hoc criminal tribunals, which establish "target dates"³⁶ for the conclusion of investigations, trials, and "all [other] work."³⁷

³³ For a useful summary of various control mechanisms, see Helfer & Slaughter, *supra* note 17, at 944 tbl. 3.

³⁴ See, e.g., Statute of the International Tribunal for the Law of the Sea, art. 41 (providing a means for the amendment of the Statute); Statute of the International Court of Justice, art. 69 (same).

³⁵ See, e.g., S/RES/1512 (2003) (ICTR); S/RES/1503 (2003) (ICTR); S/RES/1431 (2002) (ICTR and ICTY).

³⁶ Statement by the President of the Security Council, UN Doc. S/PRST/2004/28.

³⁷ See S/RES/1503 (2003), para. 7; S/RES/1534 (2004), para. 3. On the completion strategies, see Daryl A. Mundis, *The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT'L L. 142 (2005); Larry D. Johnson, *Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 99 AM. J. INT'L L. 158 (2005); Dominic Raab, *Evaluating the ICTY and Its Completion Strategy*:

Though the dates specified by the Council are couched in less than binding language, the evident threat is that the courts will be shut down, and their mandates terminated, at the close of the specified period.

2. Rules Control

States can also control a court through the strict drafting of applicable law *ex ante*, subsequent interpretation of the law, and the formal revision of that law *ex post*. To this end, most treaties allow for amendment and some provide mechanisms for the parties to adopt authoritative interpretations of the agreement.

The detailed Elements of Crimes and Rules of Procedure and Evidence set out by the States Parties to the International Criminal Court demonstrate the lengths to which States can go to limit a court's discretion *ex ante*.³⁸ These documents were a conscious attempt by their drafters to limit judicial discretion. This move resulted, in part, from concerns that the crimes in the Court's Statute were too vague, infringing on the principle of legality (*nullum crimen sine lege*) and allowing for the possibility of judicial lawmaking.³⁹ It also reflected dissatisfaction with the active rulemaking by ICTY and ICTR judges.⁴⁰ Indeed, one former-ICTY judge described the Elements of Crimes as "an overwhelming exercise in legal positivism."⁴¹ He concluded that the "drafting of the ICC Statute and the *Elements of Crimes* illustrates clearly an intent on [the] part [of the States Parties to the Rome Statute] to maintain control over the making of international law and to keep a tight leash on the ability of international judges to go beyond what [they] have agreed to."⁴² Another former-ICTY judge and president, referring to the ICC Statute, lamented that it "seems to evince a certain mistrust in the Judges."⁴³

Efforts to Achieve Accountability for War Crimes and their Tribunals, 3 J. INT'L CRIM. JUST. 82 (2005).

³⁸ ICC-ASP/1/3.

³⁹ See William K. Lietzau, *International Criminal Law After Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROBS. 119, 122-23 (2001); see also William K. Lietzau, *Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court*, 32 CORNELL INT'L L.J. 477 (1999).

⁴⁰ Article 51 of the Rome Statute provides that the Rules of Procedure and Evidence are to be adopted by the Assembly of States Parties. Judges can only adopt provisional rules in "urgent cases," which will then be reviewed by a subsequent Assembly of States Parties. Rome Statute, art. 51(3).

⁴¹ David Hunt, *The International Criminal Court: High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges*, 2 J. INT'L CRIM. JUST. 56, 59 (2004).

⁴² *Id.* at 61.

⁴³ Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 163 (1999); accord Board of

The North American Free Trade Agreement (NAFTA) provides an example of *ex post* rules control. Pursuant to that agreement, the NAFTA's Free Trade Commission (FTC), whose members are the three NAFTA parties, has the authority to interpret provisions of the NAFTA, and the FTC's interpretations are binding on NAFTA dispute resolution panels.⁴⁴ Indeed, such interpretations may effectively "overrule" interpretations given to the same provisions in earlier decisions of dispute resolution panels. In 2001, the Commission did precisely this following three awards interpreting a particular NAFTA provision.⁴⁵ The three NAFTA parties decided that these interpretations were incorrect, and the FTC issued its own interpretation.⁴⁶ The FTC's interpretation was subsequently followed by panels in *The Loewen Group, Inc. v. United States*⁴⁷ and *Pope & Talbot, Inc. v. Canada*.⁴⁸

Editors, *The Rome Statute: A Tentative Assessment*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1901, 1904 n.2 (Antonio Cassese, Paola Gaeta, & John R.W.D. Jones, eds., 2002) (suggesting that the detailed drafting of the ICC's Elements of Crimes "was symptomatic of States' concern to control the Court and its judges").

⁴⁴ NAFTA, arts. 1131(2), 2001(2)(c). The WTO Agreement also allows its members, by a vote of three-fourths, to interpret the Agreement. See Agreement Establishing the World Trade Organization, art. XI(2). The members have never adopted an interpretation and only once has an interpretation been proposed. See General Council, Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization – Communication from the European Communities, WT/GC/W/133, 25 January 1999; and General Council, Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization – Communication from the European Communities, WT/GC/W/143, 5 February 1999.

⁴⁵ See *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/01, Award (NAFTA Chapter 11 Tribunal, Aug. 30, 2000), available at http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Metalclad/laudo/laudo_ingles.pdf; *S.D. Myers, Inc. v. Canada*, Partial Award (NAFTA Chapter 11 Tribunal, Nov. 13, 2000), available at http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcnadapartialaward_final_13-11-00.pdf; *Pope & Talbot, Inc. v. Canada*, Award on the Merits of Phase 2 (Apr. 10, 2001), available at http://www.dfait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf.

⁴⁶ Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions, available at <http://www.state.gov/documents/organization/38790.pdf> (interpreting NAFTA article 1105(1)'s "minimum standard of treatment in accordance with international law" provision).

⁴⁷ *The Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶¶125-128 (NAFTA Chapter 11 Tribunal, June 26, 2003), available at <http://www.state.gov/documents/organization/22094.pdf>.

⁴⁸ *Pope & Talbot, Inc. v. Canada*, Award in Respect of Damages, ¶51 (NAFTA Chapter 11 Tribunal, May 31, 2002), available at http://www.dfait-maeci.gc.ca/tna-nac/documents/damage_award.pdf.

3. *Staffing Control*

Another mechanism by which States can control courts is through judicial appointments.⁴⁹ Staffing control can take place in a number of ways: through the establishment (or not) of judicial term limits; through the manipulation of the judge's term of office; through the nomination, election, and reappointment of judges; through the granting of certain privileges and immunities to judges; and through the designation of judicial seats for certain States, regions, or persons with particular competences and experience.⁵⁰ Presumably, States put some thought into those who they nominate and elect to the international bench. Further, it is assumed that judges are more likely to do a good job if they wish to be re-appointed and that a judge who does a poor job will not be re-nominated or re-elected.

4. *Budget Control*

Courts are entirely dependent on States and international organizations for their funding.⁵¹ The expenses of the Special Court for Sierra Leone, for example, are “borne by voluntary contributions from the international community.”⁵² The Presidents of the International Criminal Court and the International Tribunal for the Law of the Sea depend on their respective States Parties to bear the courts' expenses, in ways decided by their Assemblies of States Parties.⁵³ And the Presidents of the ICJ, ICTY, and ICTR go hat in hand to the U.N. General Assembly at least every other year to garner sufficient funds.⁵⁴ Conceivably, States can signal their displeasure

⁴⁹ See generally Adam M. Smith, “*Judicial Nationalism*” in *International Law: National Identity and Judicial Autonomy at the ICJ*, 40 *TEX. INT'L L.J.* 197 (2005).

⁵⁰ See, e.g., Rome Statute of the International Criminal Court, art. 36(5) (requiring there to be an “equivalent proportion” of judges with competences in criminal law and procedure and in international humanitarian law and the law of human rights); *id.*, art. 36(8) (stating the parties shall take into account in the selection of judges, inter alia, “[e]quitable geographic representation” and a “fair representation of male and female judges”).

⁵¹ See generally Thordis Ingadottir, *The Financing of Internationalized Criminal Courts and Tribunals*, in *INTERNATIONALIZED CRIMINAL COURTS* 271 (Cesare P.R. Romano, André Nollkaemper, & Jann K. Kleffner eds., 2004); Cesare Romano, *The Price of International Justice*, 4 *LAW & PRAC. INT'L CTS. & TRIBUNALS* 281 (2005).

⁵² Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 6. States have not always voluntarily provided sufficient funds to the Special Court, and the United Nations was called upon in 2004 to make up the shortfall. See UN Doc. A/RES/58/284 (2004).

⁵³ Statute of the International Tribunal for the Law of the Sea, art. 19; Rome Statute of the International Criminal Court, art. 115.

⁵⁴ The budgets of the ICJ and the ad hoc tribunals are voted on every two years, though there are occasional amendments. See, e.g., A/RES/58/255 (2003) (ICTY); A/RES/58/253 (2003) (ICTR); A/RES/59/273 (2004) (ICTR); A/RES/59/274 (2004)

with a court by limiting its funds. Indeed, one scholar has asserted recently that “[k]eeping [the ICJ] on a tight budget looks increasingly like a poorly concealed attempt to influence it.”⁵⁵

5. *Decision Control*

The final category of external control is decision control: mechanisms that remove a State from a court’s jurisdiction, either *ex ante* or *ex post*, or deny the applicability to a State of a court’s ruling. Decision control is different from mandate control because it operates at the level of the individual State. Jurisdictional avoidance can occur in three ways: a State may refuse to consent to a court’s jurisdiction in whole or in part; a State may take a reservation to a treaty, thereby denying a court the ability to apply that rule to that State; and a State, having previously consented to a court’s jurisdiction or to a treaty regime, usually may exit. Denial of a court’s ruling takes the form of noncompliance.⁵⁶

There are, of course, many examples of decision control. In 1986, in reaction to rulings by the International Court of Justice, the United States withdrew from its blanket consent to the Court’s jurisdiction, and in 2005 the United States withdrew from a treaty that gave the Court jurisdiction over disputes pertaining to the Vienna Convention on Consular Relations.⁵⁷ The United States now generally refuses to consent to any new treaty that provides the ICJ with jurisdiction over disputes without having the option to waive such a provision.⁵⁸ But the United States, certainly, is far from the only State that has avoided – partially or entirely – the decisional authority of international courts or failed to comply with a court’s ruling.⁵⁹ In 2002, Australia revised its consent to ICJ and International Tribunal for the Law of the Sea jurisdiction to exclude disputes relating to the delimitation of maritime zones, lest a possible claim be brought against it by East Timor in those fora.⁶⁰ And in 2004, the United Kingdom altered its general

(ICTY); A/60/6 (Sect. 7) (2005) (Secretary-General’s request on behalf of the ICJ for the 2006-2007 biennium ICJ budget).

⁵⁵ Romano, *supra* note 51, at 286.

⁵⁶ On noncompliance, see Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT’L L. 189 (2006).

⁵⁷ See Adam Liptak, *U.S. Says It Has Withdrawn from World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16.

⁵⁸ See, e.g., Letter of Submittal of the Department of State on the United Nations Convention Against Corruption, S. Treaty Doc. 109-6, at 20 (2005); United Nations Convention Against Corruption, art. 66(3).

⁵⁹ Cf. Laurance R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

⁶⁰ See Declaration [of Australia] Under Paragraph 2 of Article 36 of the Statute of the International Court of Justice, Mar. 21, 2002 (amending its declaration to

consent to the jurisdiction of the ICJ so that a threatened case by Mauritius would not fall within the Court's competence.⁶¹

Decision control – in the form of jurisdictional avoidance or noncompliance – is the most extreme of external control mechanisms. It is, essentially, a repudiation – temporarily or permanently – of international dispute resolution. Hence, from an idealistic perspective, it is the least desirable form of external control.

B. *Limitations on External Controls*

External controls, from the look of them, are imposing. Because decision control works unilaterally, it is not easily mediated; consequently, decision control operates effectively, albeit somewhat crudely. Intermediate controls, in contrast, require cooperation and coordination among States and therefore are more susceptible to frustration. As a consequence, there are two fundamental limitations on intermediate external controls over international courts: judicial independence and structural constraints inherent in the international system. These limits significantly undermine the efficacy of intermediate external controls over international courts.

preclude “any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation”); Declaration [of Australia] Under Paragraph 1(a) of Article 298 of the 1982 United Nations Convention on the Law of the Sea, Mar. 21, 2002 (declaring that Australia “does not accept any of the procedures provided for in section 2 of Part XV (including the procedures referred to in paragraphs (a) and (b) of this declaration) with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations”). Australia was concerned that East Timor, upon gaining independence, would submit a dispute to the ICJ or ITLOS regarding sovereignty over the Timor Gap. See Gillian Triggs & Dean Bialek, *Australia Withdraws Maritime Disputes from the Compulsory Jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea*, 17 INT'L J. MARINE & COASTAL L. 423, 423 (2002).

⁶¹ See Declaration of the United Kingdom Under Article 36, Paragraph 2, of the ICJ Statute, July 5, 2004 (altering the United Kingdom's previous declaration so that the Court's jurisdiction would henceforth cover only disputes arising after January 1, 1974 and those that are brought by States that are not and have never been a member of the Commonwealth). The United Kingdom was fearful that Mauritius would bring a case regarding the status of the Chagos Islands in the Indian Ocean. See Nita Bhalla, *Mauritius Stakes Claim for Chagos*, BBC NEWS, Mar. 30, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/3583927.stm>; Ewen MacAskill, *Mauritius May Sue for Diego Garcia*, THE GUARDIAN, July 7, 2004, available at <http://www.guardian.co.uk/international/story/0,3604,1255446,00.html>.

1. *Judicial Independence*

As an initial matter, States have less control over judges than they do over other international civil servants because of judicial independence.⁶² Independence, here, means the freedom from coercion.⁶³ Such independence means that States cannot direct judges to decide cases in certain ways, even if those judges are nationals of that State. Though the presumption of judicial independence may not have obtained for certain ICJ judges from totalitarian States during the Cold War,⁶⁴ it must be assumed today. This is not to suggest, certainly, that judges are completely impartial, especially when they decide cases in which their State of nationality is a party, only that judges are free to decide cases in accordance with their views, which will necessarily reflect their backgrounds.⁶⁵

That States take judicial independence seriously became evident during the discussion in the Security Council of the completion strategies for the ICTY and ICTR.⁶⁶ Some States worried that directing the ad hoc courts to complete their missions by certain dates impermissibly directed the courts, particularly their judges, to take certain positions. France, in a letter to the President of the Security Council, made clear its view that the completion strategies “should not be construed as undermining the principle of independence of the two Tribunals and the separation of their functions [from those of the Council].”⁶⁷ As a consequence of the need and desire for judicial independence, it has been, according to a former Assistant Secretary-General for Legal Affairs, “extremely difficult for . . . the Tribunals’

⁶² See Steve Charnovitz, *Judicial Independence in the World Trade Organization*, in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 219, 227-28 (Laurence Boisson de Chazournes, Cesare Romano, & Ruth Mackenzie eds., 2002) (noting that “judicial independence was recognized by the parties drafting the WTO”).

⁶³ See Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 536 (1999).

⁶⁴ See W. Michael Reisman, *Metamorphoses: Judge Shigeru Oda and the International Court of Justice*, 33 CAN. Y.B. INT’L L. 185, 187 (1995). The Soviet Union claimed the same with regard to Western ICJ judges. See Zigurds L. Zile, *A Soviet Contribution to International Adjudication: Professor Krylov’s Jurisprudential Legacy*, 58 AM. J. INT’L L. 359, 365 (1964).

⁶⁵ Cf. Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005).

⁶⁶ As a formal matter, statutes of international courts state that judges are to be “independent.” See, e.g., Statute of the International Court of Justice, art. 2 (“The Court shall be composed of a body of independent judges . . .”).

⁶⁷ Letter Dated 30 March 2004 from the Permanent Representative of France to the United Nations Addressed to the President of the Security Council, UN Doc. S/2004/265.

parent organ, the Security Council, to hold [them] strictly accountable.”⁶⁸

2. *Structural Constraints*

Aside from judicial independence, there are numerous structural constraints that limit the ability of States to control international courts. There are three types: (1) multiple principals constraints; (2) monitoring constraints; and (3) competing non-legal policy constraints.

Constraints on State control flow, in part, from the fact that international courts have multiple principals. Thus, even when the control mechanism is centralized, such as through the Security Council or an Assembly of States Parties, control is effectively mitigated by the inability of States to agree. This is especially evident with rules control. Unlike in the United States and other developed legal systems, where judicial interpretations of statutory⁶⁹ and constitutional⁷⁰ provisions can be and are overturned, States have great difficulty with re-legislating international law.⁷¹ This, as one commentator has written, is international law’s “missing legislator” problem.⁷² The same difficulties apply to revising a court’s mandate.

For similar reasons, States cannot effectively control courts through appointments. Inter-State coordination of nominations and

⁶⁸ Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT’L CRIM. JUST. 541, 543 (2004).

⁶⁹ See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991) (concluding that “Congress and its committees are aware of the [Supreme] Court’s statutory decisions, devote significant efforts toward analyzing their policy implications, and override those decisions with a frequency heretofore unreported”).

⁷⁰ Four constitutional amendments have overturned Supreme Court decisions: the Eleventh Amendment, overturning *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); the Fourteenth Amendment, overturning *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); the Sixteenth Amendment, overturning *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895); and the Twenty-Sixth Amendment, overturning *Oregon v. Mitchell*, 400 U.S. 112 (1970). There, of course, a large literature on “conversations” between courts and the legislative and executive branches. See, e.g., Luc B. Tremblay, *The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures*, 3 INT’L J. CONST. L. 617 (2005).

⁷¹ See, e.g., Jeffrey Atik, *Democratizing the WTO*, 33 GEO. WASH. INT’L L. REV. 451, 454 (2001); Konstantin J. Joergens, *True Appellate Procedure or Only a Two-Stage Process? A Comparative View of the Appellate Body Under the WTO Dispute Settlement Understanding*, 30 LAW & POL’Y INT’L BUS. 193 (1999); Vaughan Lowe, *Advocating Judicial Activism: The ITLOS Opinions of Judge Ivan Shearer*, 24 AUSTL. Y.B. INT’L L. 145, 152 (2005).

⁷² Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK Y.B. U.N. L. 609, 651 (2001).

elections takes the form of horse-trading and not substantive review. Usually, judges are nominated and rotated on a geographical basis that has no connection *ex ante* with a judge's views or *ex post* with a judge's decisions. As Judge Thomas Buergenthal has recently written, "What struck me in my re-election campaign is how highly politicized the election process is for the various judicial positions that the UN membership has to vote for and how little judicial qualifications of the individual candidates or their judicial record seem to matter."⁷³ Even States, such as the permanent five members of the Security Council, that traditionally have guaranteed seats on international courts seldom rotate their judges, even when there has been a change in government. Only in exceptional cases have substantive considerations mattered.⁷⁴ Judges, therefore, have little concern that their decisions will affect their chances for reappointment or promotion, and this increases their independence while on the bench.⁷⁵

Monitoring constraints also mitigate effective control of international courts. In domestic systems, we rely upon a host of actors – the government, private parties (including practitioners and academics), and the media – to monitor and report on judicial activities. In the international system, such monitoring devices exist but are much more attenuated or non-functional. Thus, even though many (though not all) court sessions are open, decisions and opinions are public, and press releases are issued, the media report on only the most high-profile cases (such as that of Slobodan Milošević) and seldom with any insight.⁷⁶ Further, even the most affluent of States cannot afford the resources to track every action of every court. With particularly active courts, such as the ad hoc international criminal tribunals, it is especially difficult to read and analyze the plethora of documents produced. It is true that some States, including the United

⁷³ Buergenthal, *supra* note 27, at 498.

⁷⁴ Thus, the majority of the UN General Assembly, unhappy with the ICJ's judgment in the *South West Africa (Second Phase)* case, replaced the judges who voted on the "wrong" side. As a consequence, five years later the court's decision was essentially reversed in the *Namibia* case, through the election of judges. See Edward McWhinney, *The International Court of Justice and International Law-making: The Judicial Activism/Self-Restraint Autonomy*, 5 CHINESE J. INT'L L. 3, 10-11 (2006).

⁷⁵ See Karen J. Alter, *Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System*, 79 INT'L AFF. 783, 795-96 (2003); Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 S. CAL. L. REV. 455 (1999). Contrast the domestic situation in the United States and Japan: J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J.L. ECON. & ORG. 259 (1997); Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 192-95 (1991); Gregory B. Sisk, Michael Heise, & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1487-93 (1998).

⁷⁶ See Monica Hakimi, *The Media as Participants in the International Legal Process*, 16 DUKE J. INT'L & COMP. L. 1, 21-27 (2006).

Kingdom and the United States, maintain very small staffs in The Hague to, among other things, monitor and interact with the tribunals that sit there, but it is still next to impossible to digest everything. For the vast majority of States, it is impossible. Even the U.N. Security Council and General Assembly have difficulties.⁷⁷ One might expect States to only truly pay careful attention to courts (and, consequently, one might expect courts to pay careful attention to States) when States are participants in a proceeding – either as a party or when subject to orders by a court.⁷⁸ Much happens, therefore, in the absence of oversight.⁷⁹

But even if a few State officials can get a handle on what's going on, it is difficult for a State to react to judicial errors. This is not just a matter of bureaucracy; it is also a matter of competing policies. Legal policy is only one of any number of policies that make up a State's foreign policy. Thus, even if a State decides that an international tribunal has exceeded its jurisdiction or committed an error of law that would have a direct effect on that State's international obligations, it is still be possible that the State would take no corrective action because of other, competing policies. For instance, even if the United States took issue with a particular ruling of the ICTY, one might wonder whether it would attempt to take action against the ICTY because the United States is very supportive of that institution for foreign policy reasons.

C. *The Limits of External Controls: Independent Courts*

In domestic systems, we have a structure of independent judges within a dependent judiciary.⁸⁰ Individual judges are provided independence but the courts are kept in check by various intermediate control mechanisms – primarily re-legislating and re-allocation of jurisdiction. Though only occasionally used, such controls are

⁷⁷ See Dominic Raab & Hans Bevers, *The International Criminal Court and the Separation of Powers*, 3 INT'L ORGS. L. REV. 93, 103-4 (2006) (“Representatives of the Fifth Committee [of the General Assembly, which is responsible for budgetary issues,] and the Security Council often lack a high level of specific expertise in or experience with criminal courts.”).

⁷⁸ See, e.g., Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber (Dec. 9, 2005); Jacob Katz Cogan, *Prosecutor v. Milutinović, Decision on Requests of the United States of America and the North Atlantic Treaty Organisation for Review*, 101 AM. J. INT'L L. (forthcoming 2007).

⁷⁹ See, e.g., Raab & Bevers, *supra* note 77, at 104 (noting how the ICTY's “plea-bargaining and sentencing policy more broadly have developed in a rather haphazard manner without independent review”).

⁸⁰ See John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999).

effective; hence, they act not only as correctives but as deterrents. When combined with internal controls, they make for highly-developed systems of control.

The same cannot be said for international law, which is mostly a system of independent judges within independent courts. Because of the limitations on intermediate external control mechanisms peculiar to international system, the optimal conditions for their effectiveness do not exist in practice, except in limited cases. Courts are most likely to be properly controlled when they are supervised by fewer principals, when there are opportunities for effective re-legislating, or when the stakes are extraordinarily high. Thus, both the NAFTA and the WTO contain mechanisms for judicial correction, but only in the case of the NAFTA have the three Parties agreed to correct a judicial decision. In most cases, international courts lack effective supervision because the effect of those intermediate mechanisms of control – the ones that are used so well in domestic systems – is mediated by the structural limitations of the international system or by the principle of judicial independence. Consequently, as one commentator has put it, referring to the ICTY, international courts largely look after themselves.⁸¹

IV. CAN INTERNATIONAL COURTS EXERT SELF-CONTROL?

Commentators focus on external controls on international courts, as if those were the only mechanisms that keep judges in check. But as important, if not more important, are internal controls – those checks on the operation of the judiciary that are applied by judges to themselves.⁸²

In the absence of effective external checks, internal checks are particularly important because international judges are not simple agents applying the law disinterestedly, at least not always. International judges, like their domestic counterparts, have interests like anyone else.⁸³ These interests are both attitudinal – in the sense of

⁸¹ See Raab & Bevers, *supra* note 77, at 104 (quoting Chris Stephen, *Analysis: Setting the Hague Record Straight*, IWPR TRIBUNAL UPDATE, no. 300, Feb. 10-15, 2003, available at http://www.iwpr.net/?p=tri&s=f&o=166536&apc_state=henitri2003).

⁸² Cf. Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 969 (1995) (“The hard features of our judicial system . . . largely are useful in a negative sense They do not provide positive inducements to behave in a desirable manner . . .”).

⁸³ See, e.g., Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); Frederick Schauer, *Incentives, Reputation, and the Inglorious*

being based on ideology or preferred public policy – and personal – in the sense of being based on ambition, respect, popularity, and other forms self-interest. Such interests can run against – and override – the external limits placed upon international courts and judges. Hence the need not only for strong external controls but also for strong internal controls.

This Part looks at techniques of judicial self-control and their limits. It argues that while there are a number of internal control mechanisms that operate on international judges, these are, by their very nature, weak. On the other hand, international judges have strong interests of their own, and those interests are empowered by the inherent authorities of international courts.

A. *Internal Controls on International Courts*

Internal controls on international courts are both formal and informal. They can be divided into three categories of constraints: professional norms, judicial ego, and legal process. All three types of control are weak, but they do have their effects and they cannot be ignored.

1. *Professional Norms*

Foremost, international judges are limited by the professional norms associated with their office, primarily independence and impartiality.⁸⁴ Though such norms exist as a necessary consequence of a judge's election, "for [a new] international judge to conduct himself in an impartial and independent way," writes Judge Theodor Meron, "may require adaptation and discipline."⁸⁵ As part of this process, the statutes of most international courts require that judges, before they take their seats, make a solemn declaration⁸⁶ that is designed to impart notions of impartiality and conscientiousness to the

Determinants of Judicial Behavior, 68 U. CIN. L. REV. 615 (2000). My discussion of judicial self-interest relies a good deal on previous work done in the U.S. context by, among others, LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006); Schauer, *supra*; and Cass, *supra* note 82.

⁸⁴ These norms are seldom specified in any detail. The Code of Judicial Ethics, adopted by the judges of the International Criminal Court, is an exception.

⁸⁵ Meron, *supra* note 12, at 360.

⁸⁶ *See, e.g.*, Statute of the International Court of Justice, art. 20 ("Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously."); Rome Statute of the International Criminal Court, art. 45; Statute of the International Tribunal for the Law of the Sea, art. 11; Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, Rule 14; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 14.

persons taking the oath – in other words to appeal to their “internal compass.”⁸⁷ To bolster their effect, oaths are administered publicly. This is intended to suggest to the judge that he or she is publicly accountable in the event of a failure to abide by judicial norms of conduct. It is also intended to satisfy the audience that the judge will act in accordance with the norms expected of him or her. Professional norms thus act upon judges in two ways: as a reminder of agreed judicial standards and as a reminder of the possible consequences resulting from the failure to abide by those standards.

2. *Judicial Audiencies*

Judges might care about the views of the public because they might enjoy adulation and might care about the prestige of their office. Judges might also be concerned about their popularity with particular groups – such as members of the international bar, international law academics, and nongovernmental organizations – for reasons of ego (wanting to be respected), influence, and even monetary rewards (for example, by being appointed an arbitrator in international arbitrations).⁸⁸ They might care about their reputation among their colleagues, both on their own court and on other international courts, also for reasons of ego and influence. In these and other ways, international judges have been said to be a part of a “global community of law” that restricts their decision-making.⁸⁹ Finally, international judges care about whether their decisions will be complied with by States (both the parties to the case and non-parties) and whether States may withdraw their consent from the Court’s jurisdiction, and this may affect their decision-making too.⁹⁰

3. *Legal Process*

Judges are restricted, as well, in a number of technical and procedural ways. As a formal matter, they are restricted by the jurisdictional and other limits imposed by States in a court’s mandate. So too are they limited by the texts of the agreements they apply, as well as by precedent and other sources of law, including interpretative

⁸⁷ Cass, *supra* note 82, at 978.

⁸⁸ See Posner, *supra* note 83, at 13-15. Stephen Schwebel, former judge and president of the International Court of Justice, was a member of more than two dozen arbitral panels during his career on the court. See Elihu Lauterpacht, et al., Legal Opinion on Guatemala’s Territorial Claim to Belize 1 (2001), available at <http://www.mfa.gov.bz/library/documents/LegalOpinionon.pdf>.

⁸⁹ Helfer & Slaughter, *supra* note 17, at 953.

⁹⁰ In domestic systems, lower court judges who desire promotion have the related anxiety of possible reversal by a higher court. See Mark A. Cohen, *The Motives of Judges: Empirical Evidence From Antitrust Sentencing*, 12 INT’L REV. L. & ECON. 13 (1992).

rules.⁹¹ The requirement that a court give reasoned, public opinions⁹² can also set limits to a judge's decision-making.⁹³ And some courts, such as the international criminal tribunals and the WTO, include multi-judge panels and forms of appellate or quasi-appellate review in order to decrease the possibility of partiality and error.

B. *Limitations on Internal Controls*

There are, thus, a number of ways in which judges can constrain or are constrained by themselves. But there are a number of factors, some unique and some not unique to the international system, that work in favor of judicial discretion. Indeed, some of the internal constraints on judging can in fact cut in favor of activism, and other internal constraints, such as giving reasoned opinions, are not necessarily effective.⁹⁴ There are two general types of limits on internal controls: the personal and institutional interests of judges and the institutional authority of courts.

1. *Personal and Institutional Interests*

Like all judges, international judges have a variety of personal and institutional interests that overlap with or derive from their professional roles. They have views about public policy; they have opinions regarding the role of courts and judges; and they have concerns about their reputations and popularity.⁹⁵ These interests cohere into a tendency, as Karen Alter has written, for judges to “promot[e] [judicial] independence, influence, and authority.”⁹⁶ Thus, judges seek independence and autonomy from political bodies, and they seek to increase the relevance of their decisions.⁹⁷ They also tend

⁹¹ This can be true, even though, as a formal matter, international judges are not bound by prior decisions. See, e.g., MOHAMED SHAHABUDDIN, PRECEDENT IN THE WORLD COURT (1996).

⁹² See, e.g., Statute of the International Court of Justice, art. 56(1) (“The judgment shall state the reasons on which it is based.”); Statute of the International Tribunal for the Law of the Sea, art. 30(1) (same).

⁹³ See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657-58 (1995).

⁹⁴ Reasons can easily cover a self-interested decision. See Rogers M. Smith, *The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription*, in NOMOS XL: INTEGRITY AND CONSCIENCE 218 (Ian Shapiro & Robert Adams eds., 1998). On the failure of the International Court of Justice to give reasons in one case, see Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62 (2005).

⁹⁵ See generally BAUM, *supra* note 83.

⁹⁶ KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 45 (2001).

⁹⁷ See *id.* at 45-46.

to advocate expanding the power of the law, as by doing so they also expand their own power.⁹⁸

Given the structure of the international system, with its gaps, ambiguities, deficient legislative process, and weak enforcement mechanisms, these inclinations – and the opportunities to act on them – are even greater for international judges. As a result, international judges often believe in the “development of international law”⁹⁹ or, as Judge Jennings put it, “the scientific development of general international law.”¹⁰⁰ Knowing how difficult it is for States to fill the gaps, they see it as their responsibility to do so by putting their “imprimatur” on such development.¹⁰¹ Judge Jennings wrote approvingly that “It is probable that in view of the difficulties surrounding the codification of international law, international tribunals will in future fulfill, inconspicuously but effectively, a large part of the task of developing international law.”¹⁰² Judge Koroma, referring to this prediction, commented that “I believe that is what we try to do.”¹⁰³ Judge Simma of the International Court of Justice, writing in two recent judgments, complained about the “inappropriate self-restraint” and the “unnecessarily cautious way[s]” of his colleagues¹⁰⁴ and Judge ad hoc Shearer argued in an opinion that it was for the International Tribunal for the Law of the Sea to strike “[a] new ‘balance’” in the law since “circumstances have now changed.”¹⁰⁵ International judges are also believers in the power of international law and adjudication. The courts through their decisions can, some judges claim, “secur[e] the promotion of international peace and security and

⁹⁸ See John O. McGinnis, *The Limits of International Law in Protecting Dignity*, 27 HARV. J. L. & PUB. POL’Y 137, 141 (2003) (international court judges expand their own authority by expanding the authority of international law); Larry Ribstein, *The Illogic and Limits of Partners’ Liability in Bankruptcy*, 32 WAKE FOREST L. REV. 31, 63 (1997) (bankruptcy judges decide cases in ways that expand their authority).

⁹⁹ NAGENDRA SINGH, *THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE* 137 (1989).

¹⁰⁰ Robert Jennings, *The Role of the International Court of Justice in the Development of International Environment Protection Law*, 1 REV. EUR. COMMUN. & INT’L ENV’T L. 240, 242 (1992), quoted in Reisman, *supra* note 29, at 52.

¹⁰¹ Jennings, *supra* note 100, at 241.

¹⁰² 1 ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW* 41 (9th ed. 1992).

¹⁰³ Abdul G. Koroma, *International Courts and Tribunals: Alternatives to Treaty Making*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 621, 625 (Rüdiger Wolfrum & Volker Röben eds., 2005).

¹⁰⁴ Separate Opinion of Judge Bruno Simma, para. 6, Oil Platforms Case (Iran v. U.S.), International Court of Justice, Judgment of Nov. 6, 2003; Separate Opinion of Judge Bruno Simma, para. 15, Armed Activities on the Territory of the Congo (D.R.C. v. Rwanda), International Court of Justice, Judgment of Dec. 19, 2005.

¹⁰⁵ Dissenting opinion of Judge *ad hoc* Shearer, The “Volga” Case (Russ. v. Austl.), International Tribunal for the Law of the Sea, Judgment of Dec. 23, 2002, Application for Prompt Release, para. 19.

the development of friendly relations between States.”¹⁰⁶ Thus, like constitutional court judges, international court judges “seek both to preserve the normative superiority of” international law “and to ensure that [international law] becomes, or continues to be, the essential reference point for the settlement of like cases that may arise in the future.”¹⁰⁷

2. *Institutional Authority*

Courts and judges not only have their own interests, they also have their own authorities. They initially have (some) authority because it was given to them by States. But they have other kinds of authorities – independent of what States bestow upon them – by virtue of their expertise and the legitimacy inherent in their judicial role.¹⁰⁸ International courts, therefore, have “the ability . . . to use institutional and discursive resources to induce deference from others.”¹⁰⁹ That ability is based in their missions, their goals, and their methods, the ways in which they go about achieving those goals. With such abilities, international courts can use their authority to regulate current and future behavior by States and other actors. In so doing, they potentially can go beyond what States have delegated to them, as, once established, international courts have authorities independent of that delegation. These powers can be substantial. The European Court of Justice’s construction of its own authority and its transformation of the EU legal system is the best example of inherent judicial authority at work.¹¹⁰

C. *The Limits of Internal Controls: Independent Judges*

Even more so than their domestic colleagues, international judges have interests that make them inherent judicial expansionists and authorities that provide them the opportunities to implement those predilections. Believers in the power of law, international judges see it as their duty to use the courts to develop international law and to consolidate the international rule of law. Internal controls have their

¹⁰⁶ Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), ICJ Reports 1995, at 90 (30 June) (Joint Dissenting Opinion of Judges Aguilar Mawdsley and Ranjeva), *quoted in* Reisman, *supra* note 29, at 53.

¹⁰⁷ ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 141 (2000).

¹⁰⁸ See, e.g., Michèle Buteau & Gabriël Oosthuizen, *When the Statute and Rules are Silent: The Inherent Powers of the Tribunal*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD 65 (Richard May, et al. eds., 2001).

¹⁰⁹ MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS 5 (2004).

¹¹⁰ See, e.g., Karen J. Alter, *Who Are the “Masters of the Treaty”?: European Governments and the European Court of Justice*, 52 INT’L ORG. 121 (1998).

effects – judges feel compelled to decide cases under the law, as a matter of substance and process. But internal controls, which are naturally weak as they depend on self-control, can only counter these tendencies so much. Law, particularly international law, is malleable, and judges have great discretion. While international judges, of course, are not free agents, they are also not opinionless automatons.

Because of the strong judicial desire to play a positive role in the international legal order, the most effective controls on judges, therefore, will play on that need. And the best way to do that is by restricting, or threatening to restrict, the main vehicle for judicial influence – cases. In other words, international judges are most likely to exert self-control if they can envision harms to their core self-interests by failing to do so.

V. COMPETITION AND CONTROL

States are not unaware of the importance and fragility of control mechanisms. So during the Security Council debates on the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), some States put down markers for the courts. Thus, the representative of Venezuela stated that the ICTY, “as a subsidiary organ of the Council, would not be empowered with – nor would the Council be assuming – the ability to set down norms of international law or to legislate with respect to those rights. It simply applies existing international humanitarian law.”¹¹¹ And the representative of Argentina indicated that the ICTR “is not authorized to establish rules of international law or to legislate as regards such law but, rather, it is to apply existing international law.”¹¹² This was also a concern of the drafters of the WTO’s Dispute Settlement Understanding, who embedded in that agreement the rule that “Recommendations and rulings of the D[ispute] S[ettlement] [B]ody cannot add to or diminish the rights and obligations provided in the covered agreements.”¹¹³ And as we have seen, the drafters of the Rome Statute of the International Criminal Court went to great lengths to reduce judicial discretion by drafting detailed Rules of Procedure and Evidence and Elements of Crimes and all but eliminating judicial rulemaking. As States have created more courts, and noticed the flaws of existing

¹¹¹ UN Doc. S/PV.3217 (1993), at 7. It is true that the ad hoc tribunals can create their own rules and that those rules influence the outcome of cases, but that does not mean that the Security Council delegated lawmaking authority to those courts.

¹¹² UN Doc. S/PV.3453 (1994), at 8.

¹¹³ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3(2), Agreement Establishing the World Trade Organization, Annex 2.

courts, they have become increasingly interested in controlling courts *ab initio*.

But, as the above analysis indicates, these attempts will ultimately be ineffectual. Like international organizations generally,¹¹⁴ international courts have minds and interests of their own. As a result, they can be tempted to expand their powers beyond those provided for in their constitutive documents or by informal expectations. At the same time, international courts are protected from external control because of the principle of judicial independence and because of structural constraints on international lawmaking and institutional reform. This combination of weak external control and imperfect self-control provides international courts with opportunities to exceed their mandates.¹¹⁵ Though the likelihood of this happening will vary by court, there should be no doubt that international judges not only have the opportunity and the tools¹¹⁶ but, on occasion, the willingness to do this as well.¹¹⁷

Traditional mechanism of control are imperfect because they don't effectively act upon the needs of courts and judges to maintain their influence and authority. If judges have little reason to worry about external controls – that their decisions will effect their chances for reelection; that their rulings will be overturned legislatively; that their mandates will not operate perpetually; that their rulings will diminish the number of cases on their docket – they have little incentive to check their own actions. This is why those who are troubled by the breakdown of control have often looked to internal controls, suggesting that international judges be better attuned to their unique roles and exert greater self-control.¹¹⁸ Yet, as these same commentators admit, self-control is a weak hook upon which the hang international dispute resolution. What is needed are controls that are

¹¹⁴ See, e.g., BARNETT & FINNEMORE, *supra* note 109 (discussing the autonomy and authority of secretariats of international organizations).

¹¹⁵ For a similar conclusion about the European Court of Justice, see Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998).

¹¹⁶ See, e.g., Jan Klabbers, *Constitutionalism Lite*, 1 INT'L ORGS. L. REV. 31, 37-41 (2004) (describing the doctrines of conferred powers, functional necessity, and ultra vires that judges use to expand their powers).

¹¹⁷ See, e.g., REISMAN, *supra* note 7, at 11-45 (describing the breakdown of informal jurisdictional limits at the ICJ); Roger P. Alford, *Reflections on US-Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNAT'L L. 196 (2006) (concluding that, in a recent case, "the Appellate Body inappropriately expanded the WTO's authority to hear facial challenges").

¹¹⁸ See REISMAN, *supra* note 7, at 143; Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT'L & COMP. L.Q. 861 (2004); J. Patrick Kelly, *Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint*, 22 NW. J. INT'L L. & BUS. 353 (2002).

tailored to and take advantage of the structure of the international system as it exists today and the various intersecting incentives and capacities created by that structure.

A. *Competitive Adjudication*

Which brings us back to consent and decision control. The easiest and most effective way for States to control courts is to limit their ability to decide cases, by actions taken either *ex ante* or *ex post*. This is usually viewed negatively, as States opting out of the international legal system. But there is potentially a positive side to decision control too, for a State's refusal to consent to a court's jurisdiction or withdrawing from that jurisdiction communicates to the court that that State is unsatisfied with the quality of the court's work. States have an interest in finding courts that provide them with "unbiased, accurate, reasonable, and prompt resolution of disputes," failing that, they withdraw.¹¹⁹ If enough States (or important enough States) did this, then a court might lose its customer base, and without customers, a court could slide into irrelevance and maybe even shut down. Though international judges are not as dependent on litigants as pre-nineteenth-century English judges, whose salaries were based on the fees they received from litigants, they will still be solicitous of the needs of States, except in certain circumstances, in order to maintain their standing in the international legal order.¹²⁰ Faced with losing market share (and its potential consequences) because States withdraw from or refuse to accede to their jurisdiction, courts – like any supplier of goods and services – will look to reinvent themselves as more customer-friendly.¹²¹ This process of evaluation and re-evaluation is enhanced when a State has multiple fora to choose from when submitting a dispute to adjudication. The ability of States to choose among courts or to forego them entirely and the desire of courts to adjudicate cases and adjust their procedures to attract litigants together generate the incentives and dynamics for competitive adjudication. Courts will endeavor to make rules – both procedural and substantive – that accord with the interests of States, and courts will monitor the decisions of their competitors (and how they are received) in order to decide whether to adopt those innovations themselves. In this way, competition among courts can create effective control.¹²²

¹¹⁹ Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1585 (2003).

¹²⁰ *See id.* at 1587.

¹²¹ *Cf.* Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 107 (1983) (“[S]ome private judges have to attract business, so they are exposed to the same market pressures as anyone who sells a service.”).

¹²² Ruth Wedgwood has suggested a system of “competitive multilateralism” that would lead to reform of international organizations, such as the United Nations. *See*

The market for international legal services can serve as an effective control mechanism not only because it creates incentives for courts to mediate their actions in order to attract litigants but also because the system, as constructed, does not establish a bias in favor of a particular set of litigants. Not all competitive systems are so evenhanded. In the United States, for example, state long-arm statutes and choice-of-law rules allow plaintiffs in class-action tort litigation to unilaterally choose their forum, and elected state judiciaries have incentives to favor these plaintiffs, thereby creating a pro-plaintiff bias in certain jurisdictions.¹²³ In the international system, as with private international dispute resolution, plaintiffs do not have this choice, as the consent of the defendant is also required as a basis for jurisdiction. Thus, as with arbitrators in international commercial arbitration, international court judges “have strong incentives to make decisions that make *both* parties to the case, *ex ante*, better off.”¹²⁴

In some ways, international dispute resolution has always been a competitive system. States had their choice of fora, whether it was the International Court of Justice (or the Permanent Court of International Justice) or ad hoc arbitral tribunals. Sometimes, because of the nature of the dispute, only one forum – permanent or ad hoc – was available. But mostly States had their pick and opted for the forum that best suited their needs.¹²⁵ Thus, States have variously resorted to the ICJ and ad hoc arbitration to resolve their maritime boundary disputes.¹²⁶

That said, the proliferation of courts, principally over the past fifteen years, has expanded the possibilities for competition significantly. Ad hoc tribunals are fine, but, in the end, competition is enhanced by more permanent institutions because permanent judges – given the length of their tenure and the permanency of their courts –

Ruth Wedgwood, *Give the United Nations a Little Competition*, N.Y. TIMES, Dec. 5, 2005, at A23.

¹²³ See Todd J. Zywicki, *Is Forum-Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1154-57 (2006) (reviewing LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (2005)).

¹²⁴ Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 107 (2000) (emphasis added); see also Cooter, *supra* note 121, at 131 (“Private judges who maximize demand for their services from disputants, each of whom has the power to veto choice of a judge, will make decisions which are pairwise Pareto efficient . . .”).

¹²⁵ On why States may prefer arbitration over adjudication, see Loretta Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States Go to Arbitration Rather than Adjudication*, 5 LAW & PRAC. INT'L CTS. & TRIBUNALS 133 (2006).

¹²⁶ See Charney, *supra* note 27, at 315.

have greater incentives to maintain their status positions and influences than do arbitrators.

Competition has also increased because of a proliferation of treaties that not only mandate binding dispute resolution but also include provisions that institutionalize a framework for competitive adjudication. The best example of the latter is the United Nations Convention on the Law of the Sea (UNCLOS).¹²⁷ Article 287 of UNCLOS allows parties to the Convention to choose between four different types of dispute resolution: the International Tribunal for the Law of the Sea (ITLOS), the ICJ, and two types of arbitration.¹²⁸ The default (in cases where a States does not choose *ex ante* or where States have not consented to the same dispute resolution mechanism) is to one of the two forms of arbitration.¹²⁹ Because States can alter their dispute resolution choice at any time prior to a dispute or can agree *ad hoc* to one of the four dispute resolution mechanisms, the Convention imbeds competition.¹³⁰ This system of choice was established because the States negotiating the Convention could not agree upon a single method of adjudication,¹³¹ and the resulting approach makes it more likely that States that are considering ratifying the Convention will not be put off by the Convention's compulsory

¹²⁷ Similar mechanisms appear in the Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, art. 19, 30 I.L.M. 1455; the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, art. 30, 2167 U.N.T.S. 3, 34 I.L.M. 1542; and the Convention on the Regulation of Antarctic Mineral Resource Activities, June 2, 1988, arts. 56-57, 27 I.L.M. 859 (not in force). Nonbinding dispute settlement provisions that include choice of fora include the United Nations Framework Convention on Climate Change, May 9, 1992, art. 14, 1771 U.N.T.S. 107, 31 I.L.M. 809; the Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, art. 11, 26 I.L.M. 1520; the Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, art. 25, 33 U.S.T. 3476, 19 I.L.M. 841; and the Convention on Biological Diversity, June 5, 1992, art. 27, 1760 U.N.T.S. 143, 31 I.L.M. 818.

¹²⁸ United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 287, 1833 U.N.T.S. 396.

¹²⁹ See UNCLOS, art. 287(5).

¹³⁰ See Tullio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 809, 817 (1999).

¹³¹ See 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 41-45 (Myron H. Nordquist, Shabtai Rosenne, & Louis B. Sohn eds., 1989); NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA 54 (2005); Shabtai Rosenne, *UNCLOS III – The Montreux (Riphagen) Compromise*, in REALISM IN LAW-MAKING: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF WILLEM RIPHAGEN 169 (Adriaan Bos & Hugo Siblesz eds., 1986).

dispute resolution mechanism.¹³² As a result of this competition, States may forum shop and tribunals may seek to make themselves more amenable to perceived State preferences.¹³³

Another boon to the competitive system is the investor-State dispute resolution procedure under many bilateral investment treaties.¹³⁴ Here the competition works slightly differently, as disputes are referred to arbitration. Since each tribunal is constituted afresh, panel members, particularly the tribunal's President, are aware that their decisions will have an effect on the likelihood that they will be appointed to some future panel. They are, therefore, more likely to adhere to their roles.

Competition among courts is not purely theoretical. Alain Pellet, who has appeared many times before the ICJ and other international courts, noted recently that "Parties have the impression that the political, financial and human efforts involved in their consent to bring a case to the World Court are not compensated and they therefore turn toward other fora, which are perhaps less prestigious, but just as effective."¹³⁵ The impact of this competitive framework is already evident in the acts of courts. Older institutions have updated their rules to make them more user-friendly.¹³⁶ And practices or powers of one court – such as the authority to issue binding provisional measures and the use of law clerks – are being adopted or sought by other courts in the hope that they will make them more attractive to potential litigants or at least as attractive as their competitors.¹³⁷

¹³² See Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 71 (1996).

¹³³ See, e.g., Donald L. Morgan, *Implications of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Cases*, 43 HARV. INT'L L.J. 541, 550-51 (2002) (explaining why ITLOS's procedural practices, such as expediency, and interpretations of substantive law, such as the precautionary principle, might make it an attractive forum for certain States).

¹³⁴ See, e.g., Treaty Between the United States of America and the Hashemite Kingdom of Jordan on the Encouragement and Reciprocal Protection of Investment, art. IX, S. Treaty Doc. 106-30, entered into force June 13, 2003.

¹³⁵ Alain Pellet, *Remarks on Proceedings Before the International Court of Justice*, 5 LAW & PRAC. INT'L CTS. & TRIBUNALS 163, 181-82 (2006).

¹³⁶ See, e.g., International Court of Justice Rules of Court, available at http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicrulesofcourt_20050929.htm; International Court of Justice Practice Directions, available at http://www.icj-cij.org/icjwww/basicdocuments/basictext/eCourt_Practice_Directions.pdf.

¹³⁷ See, e.g., *See LaGrand Case (Ger. v. U.S.)*, Judgment, 2001 I.C.J. 104 (June 27) (holding that provisional measures issued by the court are binding); Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, to the General Assembly of the United Nations (Oct. 26, 2006) ("Quite simply, the International Court of Justice can no longer provide the service that Member States bringing cases

B. *Limitations on Competitive Adjudication*

Competitive adjudication works, though, only if judges feel the need to compete. Consequently, when courts are guaranteed sufficient business (that is, when they have exclusive and compulsory jurisdiction and when States have no option but to accede to their jurisdiction), they will not yield to the pressures of competition. For example, the European Court of Human Rights (ECHR) has compulsory jurisdiction over the member states of the Council of Europe for violations of the European Convention on Human Rights. The only mechanism of exit is withdrawal from the Council of Europe, which is not a desirable option for most States. Consequently, the ECHR has no effective competition.¹³⁸ So, too, the European Court of Justice (ECJ), which – in the wake of two recent efforts by member States to adjudicate claims by ad hoc arbitration – declared last year that it had “exclusive jurisdiction . . . in regard to the resolution of disputes between Member States concerning the interpretation and application of Community law.”¹³⁹ EU Member States were therefore prohibited from bringing disputes to courts and tribunals other than the ECJ when a question of European law was at issue. In systems, such as these, the only mechanism of control may be noncompliance, which, depending on the situation, may not be effective.

VI. CONCLUSION: COHERENCE AND COMPETITION

The international system needs more not less mechanisms for dispute resolution. Consequently, when judicial controls have broken down or are ineffective, there is the need to repair them. Like all types of reform, control regeneration is difficult but not inconceivable. In the context of international courts, control reform must take into

desire if it, as the principal judicial organ of the United Nations, is denied what is routinely accorded to every other senior court.”), *available at* http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/ispeechpresident_higgins_20061026.htm; Romano, *supra* note 51, at 288.

¹³⁸ At most, it engages in a dialogue with other international human rights courts. See Antonio Augusto Cançado Trindade, *The Merits of Coordination of International Courts on Human Rights*, 2 J. INT’L CRIM. JUST. 309 (2004).

¹³⁹ Case C-459/03, *Commission v. Ireland*, [2006] ECR I-4635, para. 132. See generally Nikolaos Lavranos, *Protecting Its Exclusive Jurisdiction: The MOX Plant Judgment of the ECJ*, 5 LAW & PRAC. INT’L CTS. & TRIBUNALS 479 (2006). This accords with the ECJ’s refusal to give direct effect to WTO Appellate Body decisions. See Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395, para. 47; Case C-377/02, *Van Parys v. Belgisch Interventie- en Restitutiebureau*, [2005] ECR I-1465, para. 48. See generally Nikolaos Lavranos, *The Communitarization of WTO Dispute Settlement Reports: An Exception to the Rule of Law*, 10 EUR. FOREIGN AFF. REV. 313 (2005).

account judicial independence and, to be effective, must also be sensitive to the structural constraints inherent in the international system. Competition accomplishes this by ensuring that the needs of courts and their judges are linked with the needs of States. Competition is not only a innocuous means of control; it also a valuable technique for the creation of better rules.

Many have worried that competition (and conflicts) among courts will lead to incoherence and unpredictability in the law and that will undermine the authority of the international legal system, which is already short on credibility.¹⁴⁰ Jurisdictional overlap, in the words of one commentator, “causes a host of problems such as legal uncertainty for the parties, endless proceedings through forum-shopping and re-litigation of the same dispute before different courts and tribunals, creation of ‘self-contained’ regimes, fragmentation of international law, and, ultimately, deterioration of the authority of dispute settlement mechanisms.”¹⁴¹ If we care about international courts and international law, the argument goes, we should do what we can to reduce, if not eliminate, conflict among courts.

Those who worry about incoherence propose two types of mechanisms to resolve such conflicts. The first imagines a hierarchical judicial system, such as by making the ICJ a court of appeal, giving the ICJ the authority to render preliminary rulings (modeled on the ECJ), extending the ICJ’s advisory jurisdiction, or creating a Tribunal des Conflits (modeled on the French system for resolving disputes between the Conseil d’Etat and the Cour de Cassation).¹⁴² The second is based on judicial comity, *res judicata*, *lis pendens*, or other “system-protective doctrines” to be created and implemented by judges.¹⁴³ Because “there is no central judicial authority [in international law] which can impose order over the entire field so as to secure unity in the overall development of the law,”

¹⁴⁰ See, e.g., SHANY, *supra* note 28, at 94, 125-26; Symposium, *Diversity or Cacophony?: New Sources of Norms in International Law*, 25 MICH. J. INT’L L. 963 (2004); Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 791 (1999); Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT’L ECON. L. 273, 366 (2006).

¹⁴¹ Nikolaos Lavranos, *The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbiter?*, 19 LEIDEN J. INT’L L. 223, 242 (2006).

¹⁴² See *id.* at 243-45.

¹⁴³ See SHANY, *supra* note 28, at 278; Lavranos, *supra* note 141, at 245-46; Martinez, *supra* note 28, at 448; August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens*, 3 LAW & PRAC. INT’L CTS. & TRIBUNALS 37 (2004); Mohamed Shahabuddeen, *Consistency in Holdings of International Tribunals*, in 1 LIBER AMICORUM JUDGE SHIGERU ODA 633 (Nisuke Ando, Edward McWhinney, & Rüdiger Wolfrum eds., 2002).

Judge Shahabuddeen has written, “there is a legal duty to take account of the need for coherence in the whole field.”¹⁴⁴ Such judicial “self-organizing,” it is claimed, “is almost certainly a necessary precondition” of “an international judicial system that functions well in all situations.”¹⁴⁵

Even assuming that’s true, coherence and order prioritize style over substance, form over outcome. Most importantly, coherence presupposes a legal system that contains adequate control mechanisms. Without adequate control mechanisms, however, a well-regulated system will not be a well-subscribed system. Coherence is a luxury afforded to us by control. Further, competition and coherence are not necessarily in tension. It is entirely possible that, after an initial period of competition in a particular substantive area, coherent rules will emerge, and, indeed, this has been the case in some areas of law.¹⁴⁶

If competition is the priority, then we should think more about competition-enhancing devices, such as treaty provisions like those in UNCLOS that provide a choice of forum, or doctrines that mediate the precedential effect of decisions,¹⁴⁷ or the simple encouragement of dissenting opinions.¹⁴⁸ Indeed, instead of striving for uniformity, we should accept and develop a system of competitive adjudication in international law.

¹⁴⁴ Separate Opinion of Judge Shahabuddeen, *Semanza v. The Prosecutor*, Decision, International Criminal Tribunal for Rwanda, Appeals Chamber (May 31, 2000), paras. 25, 28.

¹⁴⁵ Martinez, *supra* note 28, at 448.

¹⁴⁶ See, e.g., Charney, *supra* note 27, at 345.

¹⁴⁷ Cf. Nathan Miller, *An International Jurisprudence? The Operation of “Precedent” Across International Tribunals*, 15 LEIDEN J. INT’L L. 483 (2002).

¹⁴⁸ Cf. Meredith Kolsky Lewis, *The Lack of Dissent in WTO Dispute Settlement*, 9 J. INT’L ECON. L. 895 (2006).